

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MARKCUS D. BERRY,

Defendant.

Case No. 1:13-cr-158

Case No. 1:16-cv-404

OPINION & ORDER

[Resolving Docs. [30](#), [33](#), [34](#)]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

On August 19, 2013, Defendant Marcus D. Berry pled guilty to being a felon in possession of a firearm.¹ Berry petitions for habeas corpus relief under [28 U.S.C. § 2255](#).² Defendant says his sentence is unconstitutional, he is actually innocent, and he received ineffective assistance of counsel.³ These arguments lose.

First, Berry argues that his predicate offenses no longer qualify as crimes of violence and he was improperly sentenced under the [United States Sentencing Guideline § 2K2.1](#).⁴ The Supreme Court's recent opinion in *Beckles v. United States*⁵ forecloses his argument.

Defendant Berry's argument centers on the relationship between the Guidelines and the Armed Career Criminals Act.

On June 26, 2015, the Supreme Court gave an opinion in *Johnson v. United States*, holding that the residual clause of the Armed Career Criminals Act was unconstitutionally vague.⁶ If a sentencing court imposed an increased sentence based on felonies that qualified

¹ Doc. [33](#) at 1.

² Doc. [30](#). The Government opposes. Doc. [33](#).

³ Doc [30](#).

⁴ *Id.* at 4.

⁵ [No. 15-8544, 2017 WL 855781 \(U.S. Mar. 6, 2017\)](#).

⁶ [U.S. , 135 S. Ct. 2551 \(2015\)](#).

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under the residual clause alone, that sentence violated a criminal defendant's constitutional right to due process.⁷

A criminal defendant sentenced under the ACCA residual clause can collaterally challenge his ACCA affected sentence in a [§ 2255](#) habeas proceeding.⁸

The Guidelines' career offender provision defines "crime of violence" using the same language ruled unconstitutional in *Johnson*.⁹ Therefore, since *Johnson*, many criminal defendants sentenced under the Guidelines' career offender provision have argued that *Johnson*'s holding should also apply retroactively to Guidelines cases.

In *Beckles*, the Supreme Court rejected this argument. In *Beckles*, the petitioner argued that because the Court's *Johnson* opinion held "that the identically worded residual clause in the Armed Career Criminal Act . . . was unconstitutionally vague . . . the Guidelines' residual clause is also void for vagueness."¹⁰

In answering this argument, the *Beckles* Court held that because of the Guidelines' advisory nature, they "are not subject to vagueness challenges under the Due Process Clause."¹¹

The Supreme Court's decision dictates the outcome of *Beckles*-dependent cases pending across the federal courts. Berry's sentence is constitutional.

Next, Berry raises actual innocence and ineffective assistance of counsel claims.¹² Berry says his predicate offenses do not qualify him as a felon because they carry sentences of less than

⁷ *Id.*

⁸ [Welch v. United States](#), U.S. , 136 S. Ct. 1257, 1265 (2016).

⁹ See [United States Sentencing Guideline § 4B1.2\(a\)](#) (emphasis added).

¹⁰ [No. 15-8544, 2017 WL 855781, at *3 \(U.S. Mar. 6, 2017\)](#).

¹¹ *Id.*

¹² Doc. [30](#).

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a year.¹³ Berry reasons that this Court never should have sentenced him as a felon in possession of a firearm and his attorney gave ineffective assistance by failing to argue this point.¹⁴

These arguments lose.

Berry is a felon. Under 18 U.S.C. § 922(g)(1), a defendant may be prosecuted as a felon in possession of a firearm if he “has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year.” Berry was convicted of fourth degree assault on a police officer,¹⁵ a crime punishable by imprisonment for up to eighteen months.¹⁶ Defendant’s actual innocence claim fails.

Berry did not receive ineffective assistance of counsel. “Omitting meritless arguments is neither professionally unreasonable nor prejudicial.”¹⁷ Defense counsel had no responsibility to argue that Berry was not a felon.

Therefore, for the foregoing reasons, this Court **DENIES** Defendant Berry’s § 2255 petition.

IT IS SO ORDERED.

Dated: April 3, 2017

s/ James S. Gwin
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE

¹³ *Id.* at 5-6.

¹⁴ *Id.* at 5-6, 8.

¹⁵ Doc. [23](#) at 9.

¹⁶ [Ohio Rev. Code Section 2929.14\(A\)\(4\)](#).

¹⁷ [Coley v. Bagley](#), 706 F.3d 741, 752 (6th Cir. 2014).